

LBP-98-26

Before Administrative Judges:

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In the Matter of	*	Docket Nos. 50-317-LR
	*	50-318-LR
BALTIMORE GAS AND ELECTRIC	*	
COMPANY	*	ASLBP No. 98-749-01-LR
	*	
(Calvert Cliffs Nuclear	*	
Power Plant, Units 1 & 2)	*	October 16, 1998
)		

Petitioner National Whistleblower Center (NWC) has pending before the Licensing Board a petition to intervene and request for a hearing in connection with the application of Baltimore Gas and Electric Company (BG&E) for renewal of the 10 C.F.R. Part 50 operating licenses for the two units of its Calvert Cliffs Nuclear Power Plant located near Lusby, Maryland. Commission and Board directives mandated that for NWC contentions regarding the BG&E application to be timely, the contentions and supporting bases had to be submitted by October 1, 1998. On that date, however, NWC failed to provide its issue statements. Instead, NWC waited

until October 13, 1998 to submit two contentions, albeit without addressing the standards governing the admissibility of late-filed contentions. Both BG&E and the NRC staff urge us to reject the NWC hearing request because it has failed to submit any admissible contentions as required by Commission regulations.

For the reasons set forth below, we deny NWC's intervention petition/hearing request and terminate this proceeding.

I. BACKGROUND

Following receipt of BG&E's Calvert Cliffs license renewal application in April 1998, see 63 Fed. Reg. 20,663 (1998), on July 1, 1998, the agency issued a Federal Register notice that provided an opportunity for a hearing for the applicant or anyone affected by the proceeding. See 63 Fed. Reg. 36,966 (1998). Petitioner NWC responded on August 7, 1998, with a timely intervention petition/hearing request indicating it wished to challenge the BG&E renewal request. In its petition, NWC asserted it had standing to intervene as the representative of two NWC officers, one of whom is also an NWC employee and one of whom is a Board of

Directors member.¹ See Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 2-3.

Twelve days later, the Commission issued an order referring the NWC petition to the Atomic Safety and Licensing Board Panel to conduct an adjudicatory hearing, as appropriate. See CLI-98-14, 48 NRC ___, ___ (slip op. at 8) (Aug. 19, 1998). Among other things, in its referral order the Commission provided guidance on a schedule for conducting any adjudication, including a ninety-day time frame from the date of the order for Licensing Board issuance of a decision on whether NWC has standing and admissible contentions so as to merit admission as a party. See id. at ___ (slip op. at 5-6).

That same day, this Board was established to rule on the NWC hearing request. See 63 Fed. Reg. 45,268 (1998). The following day we issued an initial prehearing order. Consistent with the Commission's guidance on the timing for Board issuance of a ruling on NWC's intervention request, in that order we established a schedule of August 24 and August 27, 1998, respectively, for BG&E and staff answers to the NWC petition, see 10 C.F.R. § 2.714(c), and gave NWC

¹ In the petition, NWC also declared that if the organization was denied standing, the two individuals it was representing then wished to proceed as intervenors in their personal capacity. See Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 3.

until September 11, 1998, to supplement its hearing petition, including providing its list of contentions and supporting bases, see id. § 2.714(a)(3), (b)(1). Also in that order, we gave the applicant and the staff until October 2, 1998, to respond to NWC's supplement and announced the Board's intent to hold a prehearing conference the week of October 13, 1998, to entertain oral arguments concerning NWC's standing to intervene and the admissibility of any proffered contentions. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Aug. 20, 1998) at 2-4 (unpublished).

One day later, NWC filed a motion for an enlargement of time to postpone the proposed date for the prehearing conference. In its request, NWC asserted it needed approximately two additional months to retain experts and allow them to prepare its contentions for filing. It also declared that any new schedule for filings had to conform to the provisions of 10 C.F.R. § 2.714(b)(1), which provides that an intervention petition may be supplemented with a list of contentions without permission of the presiding officer any time up to fifteen days before the first prehearing conference is held. See Petitioner's Motion for Enlargement of Time (Aug. 21, 1998) at 1-4. Both BG&E and the staff opposed the petitioner's extension request. See

[BG&E] Answer Opposing Petitioner's Motion for Enlargement of Time (Aug. 24, 1998) at 1; NRC Staff's Answer to Petitioner's Motion for Enlargement of Time (Aug. 26, 1998) at 1. In addition, both these participants submitted answers that questioned the efficacy of NWC's intervention petition, as filed, particularly its standing to intervene. See [BG&E] Answer to Petition to Intervene and Request for Hearing of [NWC] (Aug. 24, 1998) at 4-10; NRC Staff's Response to [NWC] Request for a Hearing and Petition to Intervene (Aug. 27, 1998) at 6-9.

On August 27, 1998, we denied the NWC extension request.² In doing so, we noted that the petitioner had failed to make a showing sufficient to establish the requisite "'unavoidable and extreme circumstances'" required under the Commission's CLI-98-14 guidance. See Licensing Board Memorandum and Order (Denying Time Extension Motion and Scheduling Prehearing Conference) (Aug. 27, 1998) at 2-3 (unpublished) (quoting CLI-98-14, 48 NRC at ____ (slip op. at 6)) [hereinafter August 27 Issuance]. We also found no basis for its argument that section 2.714 provided an

² Contemporaneous with its request to the Board for additional time to submit contentions, NWC filed a motion with the Commission asking that CLI-98-14 be vacated on the grounds, among others, that the order's scheduling guidance was improper. See [NWC] Motion to Vacate Order CLI-98-14 (Aug. 21, 1998). The Commission subsequently denied that request. See CLI-98-15, 48 NRC ____ (Aug. 26, 1998).

absolute right to file contentions up to fifteen days before the initial prehearing conference. That provision, we observed, operates only in the absence of a presiding officer's action in accordance with 10 C.F.R.

§§ 2.711(a), 2.718, setting a specific deadline for the filing of intervention petition supplements, including contentions. See id. at 3-4.

NWC responded to this denial by filing a pleading with the Board noting its disagreement with our ruling. See Petitioner's Filing in Response to the Board's Initial Prehearing Order (Sept. 11, 1998). In addition, NWC requested Commission interlocutory review of our determination. See Petition for Review (Sept. 11, 1998). Although declaring it was not dissatisfied with the Board's August 27 extension denial decision, the Commission nonetheless granted the NWC petition for review and provided NWC an additional two and one-half weeks to submit its contentions. See CLI-98-19, 48 NRC ___, ___ (slip op. at 2-3) (Sept. 17, 1998). In addition, the Commission stated that "[t]he Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions." Id. at ___ (slip op. at 2) (footnote omitted).

Within a day of this Commission directive, the petitioner filed a new motion requesting that the Board postpone holding a prehearing conference until it had conducted discovery to aid in the preparation of its contentions. See Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time (Sept. 18, 1998). We denied this motion, noting that longstanding agency precedent precludes a petitioner from obtaining discovery to assist it in framing contentions. See Licensing Board Memorandum and Order (Scheduling Matters and Electronic Hearing Database) (Sept. 21, 1998) at 2 (unpublished) [hereinafter September 21 Issuance]. In that same issuance, we also established a new date for BG&E and staff responses to any NWC petition supplement and tentatively scheduled the initial prehearing conference for the week of November 9, 1998. See id. at 3. Thereafter, taking into account participant input concerning scheduling conflicts, we set November 12, 1998, as the starting date for the initial prehearing conference. See Licensing Board Order (Revised Prehearing Conference Schedule) (Sept. 29, 1998) at 1 (unpublished).

On the October 1, 1998 date established for filing NWC's intervention petition supplement,³ including its contentions and supporting bases, the petitioner submitted four documents. One was a reply to the BG&E and staff answers to its intervention petition contesting their arguments concerning NWC's standing to intervene. See [NWC] Reply to the NRC Staff and [BG&E] Answers to NWC's Petition to Intervene and Request for Hearing (Oct. 1, 1998). The second was a status report in which NWC provided a listing of the "experts" whom it asserts have agreed to assist it in the proceeding and the "areas of concern" those experts have identified to be raised as contentions or bases for contentions. See Status Report (Oct. 1, 1998) at 2-10. In this filing, however, NWC repeatedly stated that the list of concerns was not to be considered a tabulation of contentions. See id. at 1, 2, 10. Instead, reiterating its position it was entitled to amend its petition up to fifteen days before the initial prehearing conference, NWC declared that under the Board's schedule, which it was again seeking

³ In its September 17 issuance, the Commission set September 30, 1998, as the filing date for NWC's intervention petition supplement. See CLI-98-19, 48 NRC at ____ (slip op. at 2). Thereafter, as part of its September 18 filing, NWC requested a one-day religious holiday-related extension, which the Board subsequently granted. See September 21 Issuance at 2.

to extend, it had until at least October 28 to file its contentions. See id. at 1.

Also in this vein, NWC filed a third document asking the Board to vacate its September 29 order establishing a mid-November date for the initial prehearing conference. See Petitioner's Motion to Vacate and Re-schedule the Pre-Hearing Conference (Oct. 1, 1998) [hereinafter Motion to Vacate]. According to NWC, this was necessary because BG&E would not be responding to an August 28, 1998 staff request for additional information (RAI) concerning the BG&E renewal application until after the prehearing conference. According to NWC, its experts need to review the applicant's RAI responses before they could render opinions upon which it would rely in formulating its contentions. See id. at 4-6.

The petitioner's final October 1 filing requested that the Board require the applicant and the staff to (1) put NWC and the Board on their service lists for all written communications relating to the Calvert Cliffs renewal application; and (2) give NWC written notification of all status meetings concerning the application before they are held. See Petitioner's Motion Requesting to be Informed of Communication between the NRC Staff and Applicant (Oct. 1, 1998) [hereinafter Communications Motion]. These measures

are necessary, NWC declared, because a two-week delay in getting application-related materials into the agency's public document room (PDR) had made it difficult for NWC to participate effectively in this otherwise expedited proceeding. See id. at 1-2.

Thereafter, as an apparent follow up to its October 1 request to change the November 12 initial prehearing conference date, on October 7, 1998, NWC submitted a filing listing an additional eighteen staff RAIs that were sent to the applicant, most of which were not received in the PDR until after October 1. See Petitioner's Notice of Filing (Oct. 7, 1998) at 2-4. In that pleading, NWC also complained of the staff's failure to notify NWC representatives about a September 28, 1998 meeting with BG&E and declared the nineteen staff RAIs make it apparent the BG&E renewal application was not sufficiently complete so as to be acceptable for docketing in accordance with various provisions of 10 C.F.R. Part 2, Subpart A. See id. at 5-6.

In responses to the petitioner's third and fourth October 1 submissions and NWC's October 7 filing,⁴ BG&E declared (1) NWC's motion to reschedule the prehearing

⁴ Applicant chose not to respond to NWC's October 1, 1998 status report because that filing did not contain contentions. See Letter from David R. Lewis, Counsel for BG&E, to the Licensing Board (Oct. 9, 1998).

conference is really another inadequately supported request to extend the time for filing contentions that ignores prior Commission and Board rulings on the Board's authority to set a contentions filing deadline; (2) NWC's arguments regarding the need to delay contentions because of the staff RAIs is legally and factually inaccurate; (3) agency rules do not require that a petitioner be served with applicant and staff correspondence; (4) NWC's argument about the sufficiency of the BG&E application has significant factual errors; and (5) NWC's intervention petition should be dismissed because it has failed to comply with the October 1, 1998 deadline for filing contentions. See BGE's Answer to Petitioner's Motion to Vacate and Reschedule the Pre-Hearing Conference (Oct. 9, 1998) at 2-10 [hereinafter BG&E Motion to Vacate Response]; BGE's Answer to Petitioner's Motion Requesting to be Informed of Communication between the NRC Staff and Applicant (Oct. 9, 1998) at 1; BGE's Answer to "Petitioner's Notice of Filing" (Oct. 9, 1998) at 1-2. Similarly, in its responses to the second, third, and fourth NWC October 1 pleadings and NWC's October 7 filing, the staff declared (1) without designating it as such, NWC is attempting to obtain an extension of the contentions filing date without demonstrating the requisite "unavoidable and extreme circumstances" in that (a) the staff's determination to

accept the BG&E application for filing is not the subject of this proceeding, and (b) the applicant's responses to any staff RAIs can be addressed in late-filed contentions; (2) the Board acted within its authority in establishing the contentions filing deadline; (3) NWC has failed to demonstrate that it has been harmed by not being on the staff's document or public meeting distribution lists; and (4) NWC's intervention petition/hearing request should be denied because it failed to comply with the October 1, 1998 contentions filing deadline. See NRC Staff's Answer in Opposition to Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference (Oct. 9, 1998) at 3-10; NRC Staff's Response to Status Report and Petitioner's Motion to be Informed of Communication between NRC Staff and Applicant (Oct. 9, 1998) at 4-8 [hereinafter Staff Status Report/Communications Motion Response].

Petitioner NWC subsequently made two additional submissions. On October 13, 1998, NWC filed a notice in which it set forth what are labeled its first supplemental set of contentions. As contention one, NWC proffers the following:

As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 is incomplete and must be withdrawn and/or summarily dismissed.

Petitioner's Notice of Filing (Oct. 13, 1998) at 1. As the basis for this contention, NWC references the staff RAIs and the possibility of future RAIs. See id. at 2. NWC then set forth its second contention as follows:

As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations and must be denied.

Id. at 2. The basis given for these contentions is essentially the same as for contention one. See id. at 2-3. Finally, on October 15, 1998, NWC provided another notice of filing in which it lists additional staff RAIs that have recently come to its attention. These, it asserts, provide additional bases for its contentions as well as support for rescheduling the November 12 initial prehearing conference. See Petitioner's Second Notice of Filing (Concerning RAIs) (Oct. 15, 1998) at 1-4.

II. ANALYSIS

As we have noted, in its September 17 issuance giving NWC additional time to submit its contentions, the Commission advised us that an NWC failure to submit admissible contentions should result in the prompt termination of this proceeding. See CLI-98-19, 48 NRC

at ____ (slip op. at 2). NWC did not file any contentions on or before the October 1 filing date set by the Commission (and the Board, see supra note 3). NWC did submit two contentions nearly two weeks after that date;⁵ however, it made no attempt to show that either issue statement meets the 10 C.F.R. § 2.714(a) standards so as to permit late-filing.⁶ By failing to address the five section 2.714(a) criteria that govern late-filed contentions, NWC has not met its burden to establish the admissibility of its two contentions. Cf. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (petitioner has burden to supply information necessary to demonstrate admissibility of contentions under 10 C.F.R.

⁵ Rather than submitting contentions, NWC designates "areas of concern" in its October 1 status report. See Status Report at 2-10. That label, however, has no meaning in the context of a formal adjudicatory proceeding conducted under 10 C.F.R. Part 2, Subpart G. Compare 10 C.F.R. § 2.714(b) (petitioner must submit contentions in Subpart G proceeding) with 10 C.F.R. § 2.1205(e)(b) (petitioner must submit areas of concern in 10 C.F.R. Part 2, Subpart L informal adjudication).

⁶ Because this deficiency is so apparent, we see no need to call for applicant and staff responses to this filing. Moreover, because this defect supports rejection of these contentions, we need not reach the question of their sufficiency. Nonetheless, it seems apparent for the reasons we set forth below in discussing the staff application acceptance and license review process that the substantive validity of the two contentions is, at best, problematic. See infra pp. 17-19.

§ 2.714(b)(2) criteria). If the October 1 contentions deadline thus is controlling, these contentions are not admissible and, in accordance with the Commission's September 17 directive, this proceeding must be terminated.

As a consequence, the only question we must answer relative to NWC's various filings is whether there is any cause that excuses NWC's failure to comply with the clearly established contentions filing deadline. NWC does not explicitly request an extension of the contention filing deadline or make any attempt to address the standard of "unavoidable and extreme circumstances" the Commission established for obtaining such a postponement. Rather, NWC again asserts its purported "rights" under 10 C.F.R. § 2.714(b)(1) to a filing deadline based on the date of the initial prehearing conference. It also suggests that ongoing staff and applicant written exchanges (i.e., the staff RAIs and applicant RAI responses) and status meetings regarding the renewal application provide sufficient cause to put off the scheduled prehearing conference and, with it, the filing deadline for NWC's contentions.

We need not dwell at any length on NWC's renewed challenge to the Board's authority to establish the October 1 deadline for filing contentions that is not tied to the initial prehearing conference date. As we noted in

our August 27 order, the provisions of section 2.714 concerning amending and supplementing a hearing request/intervention petition set "an automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.178[,] authority to regulate the proceeding by, among other things, setting schedules."⁷ August 27 Issuance at 3-4. Certainly, the Board's authority in this regard is well established in agency practice.⁸ See, e.g.,

⁷ Section 2.714 contains two provisions concerning hearing request/intervention petition changes. Section 2.714(a)(3) relates to the filing of "amendments," while section 2.714(b)(1) concerns "supplements." The former provision generally relates to the ability of a petitioner to revise its showing regarding its standing to intervene, while the latter relates to the petitioner's list of contentions or issues. Relative to either provision, however, absent some Commission directive, it is the Board's prerogative under its general scheduling authority to override their "automatic" limits as is warranted in a particular situation.

⁸ The intervention petition amendment and contention supplement deadlines in paragraphs (a)(3) and (b)(1) of section 2.714 seemingly had more utility under earlier agency practice in construction permit and operating license (CP/OL) cases in which there was a recognized proximity presumption for standing and the threshold for admitting contentions was more relaxed. With the Commission's acknowledgment that any proximity presumption generally does not apply outside the CP/OL realm and the adoption of a higher contention admission threshold, see Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247 (1996); 54 Fed. Reg. 33,168, 33,168 (1989), petitioner submissions in support of standing and contentions generally have become more voluminous and complex, rendering insufficient the fifteen-day period

(continued...)

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159-63, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998); General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150-54 (1996). As before, we find this assertion meritless.

With this conclusion, and petitioner NWC's failure to make any attempt to obtain a timely extension of the October 1 deadline or to address the governing standard of "unavoidable and extreme circumstances,"⁹ we would be justified in dismissing this case without further discussion. Nonetheless, so that there will be no lingering uncertainty about the validity of the arguments presented by

⁸(...continued)
allotted by these provisions for applicant and staff responses and Board review of amended/supplemental filings before the initial prehearing conference.

In this regard, petitioner NWC apparently perceives some inequality in our provision of more time for BG&E and staff contention supplement responses following the Commission's grant of additional time to NWC to prepare its contentions. See Motion to Vacate at 3 & n.1. This Board action, however, was nothing more than a practical recognition that the time afforded to draft pleading responses should, when possible, be roughly equivalent to the time allotted to prepare the initial pleading. See September 21 Issuance at 3 & n.1.

⁹ As the applicant points out, see BG&E Motion to Vacate Response at 2, pursuant to the terms of our initial prehearing order, such an extension request would have been due at least three business days before the filing deadline.

NWC in support of its quest for additional time, we provide the following additional observations on the matters of the adequacy of staff preacceptance review of the BG&E application and staff postacceptance RAIs and status meetings with BG&E.

As the Commission has made clear, how thoroughly the staff conducts its preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in this adjudicatory proceeding. See The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395-96 (1995); see also New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978). Instead, the focus of this case is the adequacy of the application as it has been accepted and docketed for licensing review. See 10 C.F.R. § 2.714(b)(2)(iii). If there are deficiencies in that application, in its contentions a petitioner can specify what those are and, if the petitioner is correct such that the application is insufficient to support issuance of the requested license, then the application must be denied. Thus, any NWC concerns about the propriety of the staff's preacceptance review provide no basis for extending the time for filing its contentions.

So too, the staff's postacceptance requests for additional information and meetings with BG&E to discuss the status of its application are not matters that give any cause for delaying the filing of NWC contentions. The agency's licensing review procedures, including 10 C.F.R. § 2.102, contemplate an ongoing process in which the application may be modified or improved. See Curators, 41 NRC at 395; New England Power, 7 NRC at 281. Staff RAIs directed to the applicant and staff/applicant status meetings are well-established parts of that dynamic process. Yet, as section 2.714 makes clear, the application as docketed, not staff RAIs and status meetings, remain the focal point for any contentions. Concomitantly, the availability of the application, not ongoing staff and applicant license review related-activities, is the central concern relative to setting a deadline for filing contentions. See Private Fuel Storage, 47 NRC at 160 (delay in filing contentions relating to security plan portion of application granted because of need to issue protective order to grant petitioner access to security plan).

This is not to say that staff RAIs, applicant RAI responses, and staff/applicant status meetings are irrelevant to the adjudicatory process. For example, if a petitioner concludes that a staff RAI or an applicant RAI

response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).¹⁰ But as justification for delaying (or ignoring) a contention filing deadline, the pendency or possibility of staff RAIs or status meetings provides no exceptional cause.

III. CONCLUSION

Petitioner NWC has failed to establish cause for extending the October 1, 1998 contentions filing deadline. NWC also has failed to (1) submit any contentions on or before that filing date, and (2) establish that the two contentions it filed on October 13, 1998, meet the standards for late-filing set forth in 10 C.F.R. § 2.714(a). We must, therefore, deny its intervention petition/hearing request

¹⁰ In its October 1 communications motion, NWC expresses concern about the amount of time it takes Calvert Cliffs license renewal-related documents, including meeting notices, to become available in the agency PDR. See Communications Motion at 1-2. Although the staff notes that Calvert Cliffs meeting notices are available on the agency's Internet web site and states it has acted to put NWC on its distribution list for staff renewal application-related correspondence to BG&E and staff/applicant meeting notices, see Staff Status Report/Communications Motion Response at 7-8, relative to the timeliness of contentions it seems apparent that the delay about which NWC complains arguably would be a factor it could invoke in justifying any late-filed contention based on information from such documents or meetings.

and dismiss this proceeding for want of any admissible contentions.¹¹

For the foregoing reasons, it is this sixteenth day of October 1998, ORDERED, that:

1. The August 7, 1998 intervention petition/hearing request of petitioner National Whistleblower Center is denied and this proceeding is terminated.

2. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules on an intervention petition, this

¹¹ Because dismissal of this case is appropriate based on NWC's failure to provide any admissible contentions, we need not reach the issue of the standing to intervene of NWC or the individuals whose interests it purportedly represents.

memorandum and order may be appealed to the Commission within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD¹²

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Original Signed By
Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 16, 1998

¹² Copies of this memorandum and order were sent this date to counsel for the applicant BG&E, petitioner NWC, and the staff by Internet e-mail transmission.